A

DATO' ANTHONY SEE TEOW GUAN

v.

SEE TEOW CHUAN & ANOR

B

FEDERAL COURT, PUTRAJAYA
NIK HASHIM FCJ
ABDUL AZIZ MOHAMAD FCJ
HASHIM YUSOFF FCJ
[CIVIL APPEAL NO: 02-50-2006 (W)]

C

23 FEBRUARI 2009

EVIDENCE: *Privilege - Legal professional privilege - Communication between solicitor and client - Legal opinion - Extent of legal professional privilege - Privilege and confidentiality - Waiver and express consent - Disclosure and third parties - Discovery - Whether communication and legal opinion inadmissible - Evidence Act 1950, s. 126 - Rules of the High Court 1980, O. 24*

D

LEGAL PROFESSION: *Professional privilege - Communication between solicitor and client - Legal opinion - Extent of legal professional privilege - Privilege and confidentiality - Waiver and express consent - Disclosure and third parties - Discovery - Whether communication and legal opinion inadmissible - Evidence Act 1950, s. 126 - Rules of the High Court 1980, O. 24*

E

F

CIVIL PROCEDURE: *Discovery - Inspection of documents - Legal professional privilege - Placement of legal opinion in Part 1 of Schedule 1 in List of Documents - Whether amounted to waiver of privilege - Rules of the High Court 1980, O. 24 r. 5(2) - Evidence Act 1950, s. 126(1)*

G

This appeal by the appellant against the decision of the Court of Appeal raised important questions pertaining to the extent of professional privilege in s. 126 of the Evidence Act 1950 ('Act'). The 1st respondent was the managing director of a public-listed company, Kian Joo Can Factory Bhd ('KJCF'), while the 2nd

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respondent was its executive director and factory manager. The appellant was the executive director and general manager of KJCF. On 28 October 1996, the appellant and the financial controller of KJCF ('Alice') gave instructions and furnished information to KJCF's advocate ('PW1') about the respondents

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operating another company. Based on that, PW1 rendered a legal opinion dated 14 November 1996 ('legal opinion') containing various allegations defamatory of the respondents that had been

communicated to her by the appellant and Alice. The legal opinion was addressed to KJCF, for the attention of the appellant, who subsequently published the legal opinion to various persons. The respondents, who were also given a copy of the legal opinion by the external auditors of KJCF, brought an action for defamation against the appellant. At the trial of the action, the respondents called PW1 as their first witness and sought to admit the legal opinion. PW1, however, claimed that she was unable to answer any questions on the legal opinion by reason of privilege under s. 126 of the Act. The High Court then ordered a trial within a trial to determine the admissibility of the legal opinion. Upon its conclusion, the judge held that PW1 could not be compelled to disclose the communication she had received from the appellant and to produce the legal opinion on the ground of advocate-client privilege. On appeal, the Court of Appeal reversed the decision and held that, on the facts, the appellant had waived the confidentiality and the privilege attached to the legal opinion, and that the communication between the appellant and PW1 was not protected under s. 126 of the Act. Hence, the present appeal by the appellant in which the following issues requiring consideration: (i) privilege and confidentiality; (ii) waiver and express consent; (iii) disclosure and third parties; and (iv) discovery under O. 24 of the Rules of the High Court 1980 ('RHC').

Held (allowing the appeal)
Per Nik Hashim FCJ delivering the judgment of the court:

(1) The Court of Appeal, in taking the "loss of confidentiality" approach to determine loss of privilege, had failed to recognise the common law maxim "once privileged, always privileged" as being embodied in ss. 126 to 129 of the Act. Similarly, the Court of Appeal's finding that "confidentiality is a characteristic that can be lost" with a corresponding loss of privilege did not accord with the clear and imperative terms of s. 126 of the Act which makes no such reference, either expressly or by implication, to such a contention. It is true that a legal opinion sought is implicitly confidential but the exception under s. 126 of the Act has nothing to do with loss of confidentiality elsewhere but with whether the privilege holder *ie*, the client is prepared to waive the privilege for the court proceedings. It is the privilege that has to be waived and not the confidentiality. Thus, the finding of the Court of Appeal in treating "privilege" as being co-extensive with

A "confidentiality" was untenable. Hence, the legal professional privilege under s. 126 of the Act was absolute and it remained so until waived by the client. *Dato' Au Ba Chi v. Koh Keng Kheng* (foll); *Emperor v. Mariane G Rodrigues* (dist). (paras 20, 21, 22, 23, 24 & 25)

B

(2) Section 126 of the Act permits only one exception when the privilege no longer applies *ie*, upon the express consent of the client given and directed to the advocate who is called to court to disclose the professional communication made to him
C by his client or the advice given by the advocate. Thus, the term "express consent" in s. 126 of the Act imports the requirement that there must be an intentional and deliberate act to waive the legal privilege by the client. Since the privilege holder was KJCF, it was for KJCF to waive it and convey the
D consent to the advocate when called to give evidence. There was, on the facts, no such express consent on the part of KJCF to PW1. In this instance, it was PW1 who claimed that she was unable to disclose the legal opinion by reason of privilege under s. 126 of the Act. The appellant, acting on
E behalf of KJCF, was duty-bound to support the privilege accorded to KJCF. Thus, the real issue before the court was whether or not the refusal by PW1 to disclose the legal opinion on the ground of privilege was correct. The question of legal professional privilege being raised by the appellant in
F the defamation proceedings as a defence to the respondents' claim could not be in issue. So, on the facts of this case, the High Court's decision disallowing disclosure of the legal opinion through PW1 on the grounds of privilege and non-availability of express consent by KJCF to the witness to
G waive the privilege was correct. *Dato' Au Ba Chi v. Koh Keng Kheng* (foll). (paras 31, 35 & 39)

(3) The Court of Appeal had failed to appreciate that the privilege holder was a corporation and that KJCF, as an artificial
H entity, had to function through its human agencies, which usually would be its principal officials whether they were the directors, the top management personnel or its professional advisers. Thus, both the respondents and the appellant, as directors of KJCF, would be entitled to see and have custody
I of any legal opinion obtained by KJCF. The Court of Appeal was also erroneous in classifying the two external auditors of KJCF from Ernst & Young as "third parties" since they, as

auditors, were required by law to oversee the management of the finances of KJCF. They would have to be informed of any financial mismanagement within KJCF and were entitled to both enquire into and pursue such allegations. Thus, the persons concerned to whom disclosure was made were not "third parties" or outsiders for the purpose of legal professional privilege. Furthermore, the Court of Appeal's finding that privilege was lost or could not be claimed because the legal opinion was already in the hands of the opposite party was unsustainable. (paras 42, 44, 46 & 49)

(4) Although the appellant had placed the legal opinion under Part 1 of Schedule 1 in the List of Documents, he had raised specific objection to production of the legal opinion on the ground of legal privilege under para. 2 in the List of Documents. This was sufficient as it complied with O. 24 r. 5(2) of the RHC. Thus, the mere placement of the privileged document in Part 1 was not fatal and did not amount to waiver of privilege. Therefore, the Court of Appeal's finding that the appellant "expressly consented" to production of the legal opinion was unwarranted since such finding disregarded the specific objection taken by the appellant in his List of Documents. Further, the Court of Appeal failed to appreciate that O. 24 of the RHC merely provided a right of inspection of documents disclosed in the List of Documents and, thus, could not be taken as overriding the substantive legal provisions governing legal professional privilege contained in s. 126(1) of the Act. (paras 54 & 55)

(5) The decision of the High Court judge that PW1 could not be compelled to disclose the communication she had received from the appellant and to produce the legal opinion at the trial was therefore correct. The communication and the legal opinion were inadmissible. (para 57)

Bahasa Malaysia *Translation Of Headnotes*

Rayuan ini oleh perayu terhadap keputusan Mahkamah Rayuan membangkitkan soalan-soalan penting berkenaan dengan setakat mana tahap perlindungan profesional di bawah s. 126 Akta Keterangan 1950 ('Akta'). Responden pertama ialah pengarah urusan sebuah syarikat awam yang disenaraikan, Kian Joo Can Factory Bhd ('KJCF'), sementara responden kedua ialah pengarah eksekutif dan pengurus faktorinya. Perayu merupakan pengarah eksekutif dan pengurus awam KJCF. Pada 28 Oktober 1996,

perayu dan pengawal kewangan KJCF ('Alice') mengarahkan dan memberi maklumat kepada peguambela KJCF ('PW1') tentang responden-responden mengendalikan sebuah syarikat lain. Berdasarkan itu, PW1 memberikan sesuatu pendapat undang-undang bertarikh 14 November 1996 ('pendapat undang-undang itu') yang mengandungi beberapa pengataan yang memfitnahkan responden-responden yang telah diberitahu kepadanya oleh perayu dan Alice. Pendapat undang-undang itu diarahkan kepada KJCF, untuk perhatian perayu, yang seterusnya menerbitkan pendapat undang-undang itu kepada beberapa orang. Responden-responden, yang juga telah diberi satu salinan pendapat undang-undang itu oleh juruaudit luar KJCF, memulakan suatu tindakan untuk fitnah terhadap perayu. Pada perbicaraan tindakan itu, responden-responden memanggil PW1 sebagai saksi pertama mereka dan cuba menerima masuk pendapat undang-undang itu. PW1, walau bagaimanapun, mendakwa bahawa beliau tidak dapat menjawab apa-apa soalan mengenai pendapat undang-undang itu disebabkan perlindungan di bawah s. 126 Akta. Mahkamah Tinggi kemudiannya mengarahkan suatu perbicaraan dalam perbicaraan untuk memastikan kebolehterimaan pendapat undang-undang itu. Pada pengakhirannya, hakim itu memutuskan bahawa PW1 tidak boleh dipaksa mendedahkan komunikasi yang beliau telah terima daripada perayu dan untuk mengemukakan pendapat undang-undang itu atas perlindungan peguambela-klien. Atas rayuan, Mahkamah Rayuan menterbalikkan keputusan itu dan memutuskan bahawa, berdasarkan fakta, perayu telah mengenepikan kerahsiaan dan perlindungan yang ada pada pendapat undang-undang itu, dan bahawa komunikasi di antara perayu dan PW1 tidak dilindungi di bawah s. 126 Akta. Oleh itu, akibatnya rayuan ini oleh perayu di mana isu-isu berikut perlu dipertimbangkan: (i) perlindungan dan kerahsiaan; (ii) pengenepian dan keizinan nyata; (iii) pendedahan dan pihak-pihak ketiga; dan (iv) pemzahiran di bawah A. 24 Kaedah-kaedah Mahkamah Tinggi 1980 ('KMT").

Diputuskan (membenarkan rayuan)

Oleh Nik Hashim HMP menyampaikan penghakiman mahkamah:

(1) Mahkamah Rayuan, dalam mengambil pendekatan "kehilangan kerahsiaan" untuk menentukan kehilangan perlindungan, telah gagal mengakui pepatah common law "sekali dilindungi, selalu dilindungi" seperti yang terangkum dalam ss. 126 ke 129 Akta. Begitu juga, dapatan Mahkamah Rayuan bahawa "kerahsiaan

ialah suatu ciri yang boleh dihilang" dengan kehilangan perlidungan yang sepadan tidak patuh dengan terma-terma jelas dan imperatif s. 126 Akta yang tidak membuat apa-apa rujukan, sama ada secara nyata atau implikasi, kepada hujahan sedemikian. Ia adalah benar bahawa suatu pendapat undang-undang yang diminta ialah sulit secara tersirat tetapi pengecualian di bawah s. 126 Akta tiada kaitan langsung dengan kehilangan perlindungan di tempat lain tetapi dengan sama ada pemegang perlindungan itu, iaitu, klien, sedia mengenepikan perlindungan untuk prosiding mahkamah. Ia ialah perlindungan yang mesti diketepikan dan bukan kerahsiaan. Oleh itu, dapatan Mahkamah Rayuan dalam menganggap "perlindungan" sebagai dilanjutkan bersama dengan "kerahsiaan" tidak dapat dipertahankan. Oleh itu, perlindungan profesional undang-undang di bawah s. 126 Akta ialah mutlak dan ia kekal sedemikian sehingga diketepikan oleh klien. *Dato' Au Ba Chi v. Koh Keng Kheng* (diikuti); *Emperor v. Mariane G Rodrigues* (dibezakan).

(2) Seksyen 126 Akta membenarkan hanya satu pengecualian apabila perlindungan tidak digunakan lagi, iaitu, atas keizinan nyata klien yang diberi dan diarahkan kepada peguambela yang dipanggil ke mahkamah untuk mendedahkan komunikasi profesional yang dibuat kepadanya oleh kliennya ataupun nasihat yang diberi oleh peguambela. Oleh itu, terma "keizinan nyata" dalam s. 126 Akta mengimport keperluan bahawa mesti ada perbuatan sengaja untuk mengenepikan perlindungan undang-undang oleh klien. Oleh kerana pemegang perlindungan ialah KJCF, ia seharusnya KJCF yang mengenepikannya dan menyampaikan keizinan itu kepada peguambela apabila dipanggil untuk memberi keterangan. Atas fakta, tidak ada apa-apa keizinan nyata sedemikian yang diberikan oleh KJCF kepada PW1. Dalam ketika ini, ia ialah PW1 yang mendakwa bahawa beliau tidak dapat mendedahkan pendapat undang-undang itu disebabkan perlindungan di bawah s. 126 Akta. Perayu, yang bertindak bagi KJFC, mempunyai kewajipan untuk menyokong perlindungan yang diberi kepada KJCF. Oleh itu, isu sebenar di hadapan mahkamah ialah sama ada penolakan oleh PW1 untuk mendedahkan pendapat undang-undang itu atas alasan perlindungan ialah betul. Soalan tentang perlindungan profesional undang-undang yang dibangkitkan oleh perayu dalam prosiding fitnah sebagai satu pembelaan kepada tuntutan responden-responden tidak boleh menjadi isu. Oleh itu, atas

fakta kes ini, keputusan Mahkamah Tinggi yang tidak membenarkan pendedahan pendapat undang-undang itu melalui PW1 atas alasan perlindungan dan ketiadaan keizinan nyata oleh KJCF kepada saksi itu untuk mengenepikan perlindungan ialah betul. *Dato' Au Ba Chi v. Koh Keng Kheng* (diikuti).

(3) Mahkamah Rayuan telah gagal menyedari bahawa pemegang perlindungan itu ialah sesuatu perbadanan dan bahawa KJCF, sebagai suatu entiti buatan, mesti berfungsi melalui agensi manusianya, yang biasanya pegawai-pegawai utamanya sama ada mereka pengarah-pengarah, kakitangan pengurusan yang tinggi atau penasihat profesionalnya. Oleh itu, kedua-dua responden-responden dan perayu, sebagai pengarah-pengarah KJCF, berhak untuk melihat dan mempunyai milikan apa-apa pendapat undang-undang yang diperolehi oleh KJCF. Mahkamah Rayuan juga khilaf dalam mengklasifikasikan dua juruaudit luar KJCF dari Ernst & Young sebagai "pihak ketiga" kerana mereka, sebagai juruaudit, diperlukan oleh undang-undang untuk menyelia pengurusan kewangan KJCF. Mereka seharusnya diberitahu tentang apa-apa salah pengurusan kewangan dalam KJCF dan berhak menyoal dan mengejar pengataan sebegitu. Oleh itu, orang kepada mana pendedahan itu dibuat bukan "pihak ketiga" atau orang luar bagi tujuan perlindungan profesional undang-undang. Tambahan lagi, dapatan Mahkamah Rayuan bahawa perlindungan telah hilang atau tidak boleh dituntut sebab pihak menentang telahpun memperolehi pendapat undang-undang itu tidak boleh dipertahankan.

(4) Walaupun perayu telah letakkan pendapat undang-undang itu di bawah Bahagian 1 Jadual 1 dalam Senarai Dokumen, beliau telah menbangkit bantahan khusus terhadap pendapat undang-undang itu dikemukakan atas alasan perlindungan undang-undang di bawah perenggan 2 dalam Senarai Dokumen. Ini mencukupi kerana ia mematuhi A. 24 k. 5(2) KMT. Oleh itu, perletakan dokumen terlindung itu dalam Bahagian 1 sahaja tidak fatal dan tidak bermaksud perlindungan itu telah diketepikan. Oleh itu, dapatan Mahkamah Rayuan bahawa perayu "memberi keizinan secara nyata" kepada pendapat undang-undang itu dikemukakan tidak wajar sebab dapatan sebegitu tidak mengendahkan bantahan khusus yang diambil oleh perayu dalam Senarai Dokumen. Lagipun, Mahkamah Rayuan gagal mengambil dalam pertimbangan bahawa A. 24

KMT hanya menyediakan hak untuk memeriksa dokumen-dokumen yang didedahkan dalam Senarai Dokumen dan, oleh itu, tidak bermakna ia mengatasi peruntukan-peruntukan undang-undang substantif yang mentadbirkan perlindungan profesional yang terkandung dalam s. 126(1) Akta.

(5) Keputusan hakim Mahkamah Tinggi bahawa PW1 tidak boleh dipaksa mendedahkan komunikasi yang beliau telah terima daripada perayu dan untuk mengemukakan pendapat undang-undang itu semasa perbicaraan ialah, oleh itu, betul. Komunikasi dan pendapat undang-undang itu tidak boleh diterima.

Case(s) referred to:

B v. Auckland District Law Society [2003] 2 AC 736 ***(refd)***
Bullock & Co v. Corry & Co [1878] 3 QBD 356 ***(refd)***
Dato' Au Ba Chi & Ors v. Koh Keng Kheng & Ors [1988] 1 LNS 188 ***(foll)***
Daya Shanker Dubey v. Subhas Kumar [1992] Cri LJ 319 ***(refd)***
Derby & Co Ltd and Others v. Weldon and Others (No 10) [1991] 2 All ER 908
Emperor v. Mariane G Rodrigues [1903] 5 Bombay LR 122 ***(dist)***
Harbour Inn Seafoods Ltd v. Switzerland General Insurance Co Ltd [1990] 2 NZLR 381 ***(refd)***
Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor [1997] 4 CLJ 509 SC ***(refd)***
Mandesan v. State of Kerala [1995] Cri LJ 61 ***(refd)***
Minter v. Priest [1930] AC 558 ***(refd)***
PP v. Dato' Seri Anwar Ibrahim (No 3) [1999] 2 CLJ 215 HC ***(refd)***
R v. Derby Magistrates' Court, ex-parte B [1995] 4 All ER ***(refd)***
Re Hydrosan Ltd [1991] BCLC 418 ***(refd)***
See Teow Chuan & Anor v. Dato' Anthony See Teow Guan [1999] 4 CLJ 333 HC ***(refd)***
See Teow Chuan & Anor v. Dato' Anthony See Teow Guan [2006] 2 CLJ 292 CA ***(refd)***
Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v. Asia Pacific Breweries (Singapore) Pte Ltd and Other Appeals [2007] 2 SLR 367 ***(refd)***
Sugden v. Sugden [2007] NSWCA 312 ***(refd)***
Three Rivers DC v. Bank of England [2005] 1 AC 610 ***(refd)***
Woodhouse and Co (Ltd) v. Woodhouse [1914] 30 TLR 559 ***(refd)***
Yeo Ah Tee v. Lee Chuan Meow [1962] 1 LNS 210 ***(refd)***

Legislation referred to:

Evidence Act 1950, ss. 126(1), 127, 128, 129
Rules of the High Court 1980, O. 24 r. 5(1), (2)

Evidence Act [Sing], s. 128

Other source(s) referred to:
Dr Ronald J Desiatnik, *Legal Professional Privilege in Australia,* pp 102 & 103

For the appellant - Dato' Dr Cyrus Das (Romesh Abraham & Mathevi Balakrishnan with him); M/s Shook Lin & Bok
For the respondents - Dato' V Sithambaram (Chong Chia Chi with him); M/s Sitham & Assoc

[Appeal from Court of Appeal; Civil Appeal No: W-02-345-1999]

[Editor's note: For the Court of Appeal judgment, please see See Teow Chuan & Anor v. Dato' Anthony See Teow Guan [2006] 2 CLJ 292.]

Reported by Suresh Nathan

JUDGMENT

Nik Hashim FCJ:

[1] This appeal raises important questions pertaining to the extent of professional privilege in s. 126 of the Evidence Act 1950 (the Act).

Factual Background

[2] Briefly, the facts are that the respondent-plaintiffs and appellant-defendant are the directors and shareholders of Kian Joo Holdings Berhad (the company). The company owned 37% of the issued and fully-paid shares in Kian Joo Can Factory Berhad (KJCF) which is a public-listed company. The 1st respondent is the managing director of KJCF whilst the 2nd respondent is the executive director and factory manager of KJCF. The appellant is the executive director and general manager of KJCF.

[3] On 28 October 1996 the appellant and one Ms. Alice See, the financial controller of KJCF (Alice), met Ms. Jeyanthini Kannaperan (the advocate), then a senior legal assistant in the law firm of Shearn Delamore & Co. The appellant and Alice gave instructions and furnished information to the advocate about the respondents operating a company known as K.L. Metal Printing (M) Sdn Bhd (KLMP).

[4] Based on the instructions and information provided by the appellant and Alice, the advocate rendered a legal opinion dated 14 November 1996 containing various allegations defamatory of the respondents that had been communicated to her by the appellant and Alice. The legal opinion was addressed to KJCF, for the attention of the appellant, and the appellant subsequently published the legal opinion to various persons. The respondents were also given a copy of the legal opinion by the external auditors of KJCF. The respondents pleaded in the statement of claim that the allegations in the legal opinion were defamatory of them and bore the natural and ordinary meaning that they had dishonestly and in breach of their duties as directors of KJCF used KLMP as a vehicle to siphon sums of money away from KJCF by, in particular, the raising of fictitious invoices in favour of KLMP.

[5] Hence the respondents brought an action for defamation against the appellant to vindicate their injured reputation and integrity and seek damages as prayed for in their statement of claim dated 6 February 1997.

[6] At the trial of the action, the respondents called the advocate as their first witness. In the course of the examination of the advocate, the respondents sought to admit the legal opinion dated 14 November 1996 but the advocate claimed that she was unable to answer any questions on the legal opinion by reason of privilege under s. 126 of the Act. The High Court then ordered a trial within a trial to determine the admissibility of the legal opinion.

[7] Upon the conclusion of the trial within a trial, the learned judge (James Foong J, as he then was) held that the advocate could not be compelled to disclose the communication she had received from the appellant and to produce the legal opinion on the ground of advocate – client privilege as provided for under s. 126 of the Act. The judgment of the High Court is reported in [1999] 4 CLJ 333.

[8] On 24 March 2006 the Court of Appeal (Abdul Kadir Sulaiman JCA (later FCJ), Tengku Baharudin Shah JCA and Azmel Maamor JCA (later FCJ))reversed the decision and held that, on the facts, the appellant had waived the confidentiality and the privilege attached to the legal opinion, and that the communication between the appellant and the advocate was not protected under

A s. 126 of the Act, and ordered that the trial be continued at an early date. The judgment of the Court of Appeal is reported in [2006] 2 CLJ 292.

Questions Of Law

B **[9]** On 22 November 2006 this court granted leave to the appellant to appeal against the decision of the Court of Appeal on the following questions:

(1) Whether the principle at common law relating to legal
C professional privilege, namely, "once privileged, always privileged" is recognized under the Act, and if so, to what extent.

(2) Whether the principle of confidentiality is coextensive with
D that of legal professional privilege under s. 126 of the Act so that the privilege continues until there is a waiver.

(3) Whether the circumstances enumerated in ss. 126 to 129 of when legal professional privilege can be lost are exhaustive.

E (4) Whether the term "express consent" in s. 126 imports the requirement that there must be an intentional and deliberate act to waive legal privilege by the privilege holder.

(5) Whether the Act recognizes the common law rule of loss of
F legal professional privilege by implied waiver or that waiver could be imputed by the conduct of the holder.

(6) Where a corporation is the privilege holder, whether its directors and principal officials are classifiable as third parties
G or outsiders for purposes of legal professional privilege.

(7) Where the privilege holder is a corporation, whether its professional advisers like accountants or auditors, in particular its external auditors would be considered as third parties or outsiders for the purposes of legal professional privilege.

H

(8) Whether the principle of a limited waiver by disclosure of a privileged document to specified persons which at common law could not cause loss of legal privilege applies in Malaysia.

I (9) Whether legal professional privilege over a document could be lost by disclosure in the List of Documents under O. 24 r. 5(1) in Part 1 of the Schedule when privilege is expressly claimed in respect of the document in Part 2.

[10] With regard to the questions, I would answer them in order of Questions (1) and (2) under privilege and confidentiality; Questions (3), (4) and (5) under waiver and express consent; Question (6), (7) and (8) under disclosure and third parties, and Question (9) under discovery under O. 24 of the Rules of the High Court 1980 (the RHC).

General

[11] For ease of reference, I reproduce s. 126 of the Act which reads as follows:

> (1) No advocate shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the cause and for the purpose of his employment as such advocate by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment:
>
> Provided that nothing in this section shall protect from disclosure:
>
> (a) any such communication made in furtherance of any illegal purpose;
>
> (b) any fact observed by any advocate in the course of his employment as such showing that any crime or fraud has been committed since the commencement of his employment.
>
> (2) It is immaterial whether the attention of the advocate was or was not directed to the fact by or on behalf of his client.

[12] Section 126 comes under Chapter IX of the Act under the heading "Witnesses" dealing with what witnesses may or may not say and with their privileges and immunities. It is important to note that s. 126 is aimed at the advocate who is a witness. This section provides that no advocate shall at any time be permitted to disclose any communication made to him by or on behalf of his client for the purpose of his employment unless the client gives his express consent. It also extends to any advice given by him to his client. In the case of *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v. Asia Pacific Breweries (Singapore) Pte Ltd and*

Other Appeals [2007] 2 SLR 367, the Singapore Court of Appeal observed on s. 128 of the Singapore Evidence Act (which is in *pari materia* with s. 126 of the Act) as follows (as summarized in the Head note):

> In Singapore, legal professional privilege was *(sic)* a statutory right enacted in ss 128 and 131 of the Act. As the Act was modelled on the Indian Evidence Act 1872 (Act 1 of 1872), which itself had its roots in English law, the court would need to refer to English decisions in order to determine the scope of the said provisions as well as the current state of the law, while bearing in mind that not all English law principles could be used for this purpose as a result of s 2(2) of the Act.
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> At p 382 para 32, the court commented:
>
> As is evident from its language, s 128 applies only to an advocate or solicitor, but not to the client. He may not (a) disclose any communication made to him by or on behalf of his client, or (b) state the contents or condition of any document of which he has become "acquainted", or (c) disclose any advice given by him to his client, if all these events occurred "in the course and for the purpose of his employment as such advocate or solicitor".

[13] The importance of legal professional privilege in the administration of justice needs no emphasis. If authorities are needed then I would quote the following cases.

[14] In *R v. Derby Magistrates' Court, ex-parte B* [1995] 4 All ER, Lord Taylor CJ, speaking in the House of Lords, said at p 540:

> The principle which runs through all these cases, and the many other cases which were cited, is that a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyer in confidence will never be revealed without his consent. Legal professional privilege is thus much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests.

[15] In endorsing the above passage in the Privy Council case of *B v. Auckland District Law Society* [2003] 2 AC 736, Lord Millet said at p 756 para 44-45:

> Some principles are well established and were confirmed by Lord Taylor CJ in *R v. Derby Magistrates' Court, Ex p B* [1996] AC 487, 503 G-H. First, the privilege remains after the occasion for it has passed: unless waived "once privileged, always privileged". Secondly, the privilege is the same whether the documents are sought for the purpose of civil or criminal proceedings and whether by the prosecution or the defence. Thirdly, the refusal of the claimant to waive his privilege for any reason or none cannot be questioned or investigated by the court. Fourthly, save in cases where the privileged communication is itself the means of carrying out a fraud, the privilege is absolute. Once the privilege is established, the lawyer's mouth is "shut for ever": see *Wilson v. Rastall* [1792] 4 Durn & E 753, 759, per Buller J. The society has not alleged that any of the documents fall within the excepted category, but if any of them does it retains the right to make such a claim hereafter.
>
> It is, of course, well established that the privilege belongs to the client and not to his lawyer, and that it may not be waived by the lawyer without his client's consent. But the privilege is available to the client whether he is a layman or a lawyer; even a lawyer – perhaps especially a lawyer – has need of the services of another lawyer if he becomes personally embroiled in legal proceedings.

[16] In the *Three Rivers DC v. Bank of England* [2005] 1 AC 610 Lord Scott of Foscote said at p 647:

> … Why is it that the law has afforded this special privilege to communications between lawyers and their clients that it has denied to all other confidential communications? In relation to all other confidential communications, whether between doctor and patient, accountant and client, husband and wife, parent and child, priest and penitent, the common law recognises the confidentiality of the communication, will protect the confidentiality up to a point, but declines to allow the communication the absolute protection allowed to communications between lawyer and client giving or seeking legal advice.

[17] With the above principles in mind, I now proceed to answer the questions posed.

Questions (1) And (2): Privilege And Confidentiality

[18] These two questions arose as a result of the findings of the Court of Appeal which held that the High Court was erroneous to hold that once the legal opinion was privileged, it would remain so forever, even if it was published to third parties. The Court of

A Appeal further ruled that confidentiality is an essential requirement in s. 126 (see para 33 of the judgment), and found on the facts of this case that the communication by the appellant to the advocate was not intended to be confidential (see para 34-49) and therefore the privilege under s. 126 does not apply (see para 32) B and cited *Emperor v. Mariane G Rodrigues* [1903] 5 Bombay LR 122 in support.

[19] To lend support to the above findings the respondents submitted that the principle at common law "once privileged, C always privileged" does not extend the privilege to protect a communication which is not confidential or has subsequently lost its confidentiality. The principle of confidentiality is coextensive with that of legal professional privilege under the section. There can be no privilege without confidentiality. Once confidence ceases D privilege ceases.

[20] With respect, I do not agree. I agree with the appellant that the Court of Appeal, in taking the "loss of confidentiality" approach to determine loss of privilege, had failed to recognise the E common law maxim "once privileged, always privileged" (see per Cockburn, CJ in *Bullock & Co v. Corry & Co* [1878] 3 QBD 356 at p 358) as being embodied in ss. 126 to 129 of the Act. This common law maxim has been endorsed and approved by the high authority of the House of Lords and Privy Council in the cases quoted earlier where the privilege was accepted as being absolute. F The maxim has hitherto been followed in Malaysia as seen in the High Court case of *Dato' Au Ba Chi & Ors v. Koh Keng Kheng & Ors* [1989] 3 MLJ 445, which was adopted by the learned trial judge in the present case. Relying on the wording of s. 126 of the Act, Eusoff Chin J (as he then was) in *Dato' Au Ba*'s case held G the maxim 'once privileged always privileged' applied. The court said at p 447:

> Section 126 also says that the legal adviser shall not be permitted at any time to disclose professional communications. It is said that H a communication once privileged is 'always privileged' (per Cockburn CJ in *Bullock v. Corry & Co*).

[21] It may be noted that *Dato' Au Ba*'s case went on appeal to the then Supreme Court and the High Court's decision was I upheld but unfortunately there was no written judgment of the Supreme Court. Hence, the importance of this decision.

[22] The case of *Emperor*, relied upon by the respondents, is easily distinguishable. That case deals with a communication from a client to a solicitor for the purpose of communicating to a third party, the complainant (not the client). The solicitor had the client's instructions to make to the complainant the statements communicated by the client to the solicitor. So there was nothing of a confidential nature in the communication. Whereas our case concerns legal advice or communications made to an advocate with a view of obtaining legal advice, which would necessarily be privileged. Therefore, reliance on Emperor by the Court of Appeal is misconceived.

[23] Similarly, the Court of Appeal's finding at p 311 that "confidentiality is a characteristic that can be lost" with a corresponding loss of privilege does not accord with the clear imperative terms of s. 126 which makes no such reference, either expressly or by implication, to such a contention.

[24] It is true that a legal opinion sought is implicitly confidential but the exception under s. 126 has nothing to do with loss of confidentiality elsewhere but with whether the privilege holder ie, the client is prepared to waive the privilege for the court proceedings. It is the privilege that has to be waived and not the confidentiality. Thus, the finding of the Court of Appeal in treating "privilege" as being co-extensive with "confidentiality" is untenable.

[25] Hence, I hold that the legal professional privilege under s. 126 of the Act is absolute and it remains so until waived by the privilege holder, i.e. the client.

[26] Accordingly, my answer to Question (1) is in the affirmative while my answer to Question (2) is in the negative.

Questions (3), (4) And (5): Waiver And Express Consent

[27] The questions here concern the meaning and scope of the words "express consent" in s. 126 of the Act.

[28] The Court of Appeal, in rejecting the appellant's argument that the "express consent" under s. 126 must be express and that the consent must be directed to the advocate, held that the following facts or points of conduct constituted express consent on the part of the appellant thereby waiving the privilege that attached to the legal opinion:

A (i) By writing the words "Alice" "Tunku", dating them 14/11, and initialling on the legal opinion and subsequently publishing it to other persons.

(ii) The respondents were given a copy of the legal opinion at the B meeting held on 27 November 1996 with the external auditors, who received it from the appellant.

(iii) The legal opinion was exhibited under exh. "STC2" of the respondents' affidavit in reply to the appellant's application for striking out and was read out by the respondents' counsel in C the striking out proceedings before the registrar and on appeal before the same judge, who thereafter also heard the case.

(iv) By placing the legal opinion under Part 1 of Schedule 1 of the List of Documents under item 10.

D

In support of the above findings the Court of Appeal cited the following authorities:

(i) *Daya Shanker Dubey v. Subhas Kumar* [1992] Cri. LJ 319.

E (ii) *Legal Professional Privilege in Australia* by Dr. Ronald J Desiatnik at pp 102 & 103.

(iii) *Derby & Co Ltd and Others v. Weldon and Others (No. 10)* [1991] 2 All ER 908.

F (iv) *Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor* [1997] 4 CLJ 509.

[29] Before us, learned counsel for the respondents argued that the Court of Appeal was right in adopting the purposive approach G in interpreting s. 126 and held that the privilege had been waived by disclosing the legal opinion to various third parties including the respondents. The appellant could not resist disclosure by claiming privilege when the document had already been disclosed and in the possession of the respondents.

H

[30] It must be noted that s. 126 of the Act was enacted to give protection to legal communications and legal advice between the advocate and his client from disclosure. The section uses strong language in imposing the prohibition. No advocate "shall at any I time be permitted" to disclose such communication "unless with his client's express consent". By its terms, the section is quite

straightforward. As such, the Court of Appeal had no choice but to give effect to the plain meaning of the words used in s. 126 of the Act rather than seek to expand or modify the statutory provisions by way of reference to common law principles. McDougall J, in delivering the judgment of the Court of Appeal of New South Wales in *Sugden v. Sugden* [2007] NSWCA 312, said at para 34:

> ... the availability of client legal privilege was to be decided in accordance with the relevant provisions of the Evidence Act.

Hence, the various authorities and tests on the common law principles of waiver or acquiescence relied on by the respondents and adopted by the Court of Appeal cannot be taken to apply in the face of the specific and singular statutory exception which is clearly set out in the section.

[31] In the instant case, s. 126 of the Act permits only one exception when privilege no longer applies ie, upon the express consent of the client given and directed to the advocate who is called to court to disclose the professional communication made to him by his client or the advice given by the advocate. The case of *Dato' Au Ba, supra,* makes that clear at p 447:

> ... since the law requires the defendants **must first give their express consent to their solicitors** before the document could be released to anyone. Such consent could have been endorsed in the document itself, or given separately in writing to the effect that they consented to the document being released to the first plaintiff. (emphasis added).

Thus, the term "express consent" in s. 126 imports the requirement that there must be an intentional and deliberate act to waive the legal privilege by the privilege holder, ie, the client.

[32] The need for the client's express consent before the privilege can be waived is the same in Singapore. In *Yeo Ah Tee v. Lee Chuan Meow* [1962] 1 LNS 210, the Singapore Court of Appeal held that the privilege attaching to a statement supposedly made by the client to the Legal Aid Bureau, the client's solicitors, which the client denied making, was not expressly waived by the client's saying that he would not object to the statement being produced if he made it. Buttrose J, speaking for the court, said:

> ... I am unable to construe it as an express waiver by the plaintiff of the privilege and indeed, in my view, it falls short of that express consent of the client which is required before any such disclosure can be made. His counsel objected strongly to the evidence and claimed privilege throughout.

[33] So also is the position in India. In *Mandesan v. State of Kerala* [1995] Cri LJ 61, the notion that in the absence of "express consent" there could be loss of privilege by a failure to object or by waiver or acquiescence on the part of the client was advocated. In that case the advocate had already given evidence of the communication between him and the client and no objection had been raised on the part of the client but the High Court ruled that such communication was inadmissible under s. 126. Thomas J said at p 62:

> ... But failure to raise objection would not remove the lid of confidentiality attached to such communication between the advocate and his client. The privilege embodied in Section 126 of the Evidence Act is not liable to melt down on the principle of waiver or acquiescence. This can be more understood from Section 128 of the Act which says that by giving evidence, a party shall not be deemed to have consented to such disclosure as is mentioned in Section 126. It is only when the party calls such advocates as a witness that the party shall be deemed to have consented to such disclosure, that too only if he questions the witness about it. Section 126 uses strong language in imposing the prohibition. No advocate "shall at any time be permitted" to disclose such communication "unless with his client's express consent". A failure on the part of the client to claim privilege cannot be stretched to the extent of amounting to "express consent" envisaged in the provision (*Bhagwani v. Decoram*, AIR 1933 Sind 47).

[34] Thus, the common law rule of waiver by implication or imputation is not recognized by the cases under either the Malaysian, Singapore or Indian Evidence Act.

[35] It was common ground that the client was the company KJCF and not the directors. Since KJCF was the client of the advocate, the privilege holder was KJCF and not the advocate (see *Minter v. Priest* [1930] AC 558 at p 579) of the individual directors. It is for KJCF whether to waive it and convey the consent to the advocate when called to give evidence. Augustine Paul J (now FCJ) in *Public Prosecutor v. Dato' Seri Anwar Ibrahim (No. 3)* [1999] 2 CLJ 215 observed at p 408:

> As the privilege is that of the client, he may expressly waive it under s 126 or impliedly under s 128 of the Evidence Act 1950 by calling the advocate as his witness.

Since the trial judge found that no such consent was given, the notation of the words "Alice" "Tunku" dated 14 November and the initialling on the legal opinion by the appellant and his subsequently publishing it to other persons hardly constitute express consent on the part of KJCF to its advocate, PW1. At most, the notation was an internal communication within KJCF.

[36] The disclosure of the legal opinion by the respondents would not remove the privilege attached to the legal opinion.

[37] Under s. 126 of the Act the position is as stated in *Dato' Au Ba*'s case which was a case where the communication by the letters between client and advocate had been originally included by mistake in the agreed bundle of documents. There was therefore disclosure to the opposite party. But the High Court allowed the document to be removed or expunged from the agreed bundle on the ground of legal privilege. The earlier disclosure was held not to be a disqualifying ground.

[38] The Indian decision of *Daya Shanker Dubey, supra*, relied on by the respondents seems to rest on the peculiar facts of that case and the legal proposition itself is inconsistent with the decision in the above cases.

[39] In the present case, it is KJCF's advocate, PW1, who claimed that she was unable to disclose the legal opinion by reason of privilege under s. 126 of the Act. The appellant, acting on behalf of KJCF, was duty bound to support the privilege accorded to KJCF. Thus, the real issue before the court was whether or not the refusal by the advocate PW1 to disclose the legal opinion on the ground of privilege was correct. The question of legal professional privilege being raised by the appellant in the defamation proceedings as a defence to the respondents' claim cannot be in issue. So, on the facts of this case, the High Court's decision disallowing disclosure of the legal opinion through PW1 on the grounds of privilege and non-availability of express consent by KJCF to the witness to waive the privilege is correct. The learned judge said:

> The client has every right to object since the opening phrase of this particular section reads: "No advocate shall be permitted …" Thus unless express consent in writing by client is given to PW1 the legal opinion cannot be disclosed through her.

[40] Hence my answers to Questions (3) and (4) are in the affirmative while my answer to Question (5) is in the negative.

Disclosure And Third Parties: Questions (6), (7) And (8)

[41] These questions arose as a result of the finding of the Court of Appeal which ruled that the privilege was lost by disclosure to 'third parties'. The court said at p 311 para 52:

> The conduct of the defendant (appellant) in expressly waiving the privilege by disclosing and publishing the legal opinion to third parties is illustrative of the principle of express waiver.

By 'third parties' the Court of Appeal was evidently referring to the Chairman of the Board of Directors, the Directors, the Financial Controller of KJCF and the two external auditors (Yap and Chew of Ernst & Young) because they were the persons to whom the legal opinion was disclosed.

[42] I agree with the appellant that the Court of Appeal had failed to appreciate that the privilege holder is a corporation and that KJCF as an artificial entity has to function through its human agencies. This usually would be its principal officials whether they are the directors or the top management personnel of the company or its professional advisers. Thus, both the respondents and the appellant, as the directors of KJCF, would be entitled to see and have custody of any legal opinion obtained by KJCF.

[43] In *Woodhouse and Co. (Ltd) v. Woodhouse* [1914] 30 TLR 559, the English Court of Appeal held that where a company obtains legal advice, a shareholder of the company has a right to see it except where the shareholder is engaged in hostile litigation with the company. So, the right of directors of a company who are in management is surely a stronger right than that of an ordinary shareholder (see also *Re Hydrosan Ltd* [1991] BCLC 418). Therefore, it was erroneous for the Court of Appeal to consider Alice, the KJCF's financial controller, as a "third party"; as KJCF's chief accounting official, she would surely be concerned with the legal opinion over the funds of KJCF and to advise on the allegation that the funds were being diverted to KLMP which was operated by the respondents.

[44] Further, the Court of Appeal was also erroneous in classifying the two external auditors of KJCF from Ernst & Young as "third parties". As auditors they were required by law to oversee the management of the finances of KJCF. They would have to be informed of any financial mismanagement within KJCF and were entitled to both enquire into and pursue such allegations. It is for this purpose that all companies are required by law to employ external auditors who have to submit their independent report annually to the shareholders. It is all the more important in the case of KJCF, a public-listed company.

[45] In the present case the legal opinion had dealt with a serious allegation that "the directors (respondents) are said to have used KLMP as a vehicle to siphon substantial sums of money from KJCF by way of sale of cans from KJCF to KLMP at a loss to KJCF, raising fictitious invoices in favour of KLMP for work done/cans supplied by KJCF, …". Surely this was a matter that must be brought to the attention of the external auditors. For instance, in *Harbour Inn Seafoods Ltd v. Switzerland General Insurance Co. Ltd* [1990] 2 NZLR 381, the disclosure of privileged documents to the insurance broker who arranged the policy, the subject matter of the claim, was held not to be a waiver. The broker was an agent of the party claiming privilege. Our case is even stronger where the company KJCF was under a duty to notify the external auditors of the legal opinion it had received on this serious allegation over its finances.

[46] So, the persons concerned to whom disclosure was made were not "third parties" or outsiders for the purpose of legal professional privilege. They are to be considered as insiders who would ordinarily be concerned with the allegations mentioned in the legal opinion. They were the persons who had to decide on the recommendations made in the legal opinion as to what action should be taken by KJCF.

[47] However, it may be noted that the only "outsiders" would be:

(i) the respondents' lawyers brought in by the respondents themselves at the meeting on 27 November 1996 who had sight of the legal opinion. The respondents surely cannot complain about this because it is not a "disclosure" by the appellant but by the respondents themselves.

A (ii) the presence of Puan Misslee Harian, the legal adviser of Antah Holding, at the meeting on 4 December 1996. This legal adviser was present at Tunku's behest and was therefore his "agent". A disclosure to an agent or representative would not be disclosure to a non-party (see *Harbour Inn Seafoods, supra*).

B

[48] There is another matter which was referred to by the Court of Appeal which needs to be addressed. The Court of Appeal at paras 54 and 55 of the judgment ruled that privilege could not be C claimed because the legal opinion was now in the hands of the respondents, having been given to them by the external auditors who received it from the appellant. The case of *Daya Shanker Dubey, supra*, was cited in support to say that privilege could not be claimed because it was already in the possession of the D opposite party. It must be noted that *Daya Shanker Dubey* was largely a contempt case which had stated the proposition on legal privilege too broadly. The case failed to note that where legal professional privilege is claimed the rule is one of admissibility of the document in whosesoever hand it is found. A document E cannot be admitted as evidence if it is privileged even if it is in the hands of the opposite party. For example, if it is privileged, a document in the hands of an opposite party may be recovered back (see *B v. Auckland District Law Society, supra*). If it has wrongly been released to the opposite side in discovery F proceedings or otherwise, it may be injuncted from use (see *International Business Machines Corp, supra*).

[49] Thus, the finding of the Court of Appeal that privilege was lost or could not be claimed because the legal opinion was already in the hands of the opposite party is unsustainable.

G

[50] Accordingly, my answers to Questions (6) and (7) are in the negative while my answer to Question (8) is in the affirmative.

Discovery Under O. 24 Of The RHC: Question (9)

H

[51] This last question arose as a result of the finding of the Court of Appeal which ruled that the disclosure of the document in discovery proceedings under O. 24 r. 5(1) of the RHC in the List of Documents was a waiver of privilege. This is what the Court of Appeal said at para 67:

I

> In our judgment since the defendant (appellant) had placed the legal opinion under Part 1 of Schedule 1 under item No. 10, the defendant (appellant) has **expressly consented** to produce the document and for which he claims no privilege. Therefore the defendant (appellant) had waived the privilege to the legal opinion and it is admissible in evidence at the trial. (emphasis added)

[52] Under O. 24 r. 5(1) the List of Documents must be in Form 40. The appellant had disclosed the legal opinion in Part 1 of Schedule 1 under item No. 10. However, there was a rider claiming legal privilege in the appellant's List of Documents at para. 2 which reads:

> The Defendant (appellant) objects to produce the documents enumerated in Part 2 of the said Schedule 1 on the ground that they are privileged. The Defendant (appellant) further objects to produce the documents enumerated in Part 1 of the said Schedule 1 Nos. 1 to 10 on the grounds set out in the Defence filed herein and in particular paragraph 9 thereof.

[53] The respondents argued that if the appellant had intended to claim privilege to the legal opinion he ought to have placed it under Part 2 and not under Part 1 of Schedule 1 in the List of Documents. By placing the legal opinion under Part 1 of Schedule 1 the appellant had chosen to waive the privilege attached to it.

[54] It is true that the appellant had placed the legal opinion under Part 1 of Schedule 1 in the List of Documents but he had raised specific objection to production of the legal opinion on the ground of legal privilege under para 2 in the List of Documents as stated above. This, in my view, is sufficient as it complies with O. 24 r. 5(2) of the RHC which states:

> If it is desired to claim that any documents are privileged from production, the claim must be made in the list of documents with a sufficient statement of the grounds of the privilege.

[55] Thus, the mere placement of the privileged document in Part 1 is not fatal and does not amount to waiver of privilege. Therefore, the Court of Appeal's finding that the appellant "expressly consented" to production of the legal opinion was unwarranted as such finding disregarded the specific objection taken by the appellant in his List of Documents. Further, the Court of Appeal failed to appreciate that O. 24 of the RHC merely provides a right of inspection of documents disclosed in the

A List of Documents and therefore cannot be taken as overriding the substantive legal provisions governing legal professional privilege contained in s. 126(1) of the Act.

[56] Hence, my answer to Question (9) is in the negative.

B

Conclusion

[57] All the nine questions of law have been answered. The decision of the learned High Court judge that PW1 could not be compelled to disclose the communication she had received from
C the appellant and to produce the legal opinion dated 14 November 1996 at the trial is therefore correct. The communication and the legal opinion are inadmissible. Accordingly, the appeal is allowed with costs. The orders of the Court of Appeal are set aside. The orders of the learned High Court judge are restored and affirmed.
D The deposit is to be returned to the appellant.

[58] My learned brothers Aziz Mohamad FCJ and Hashim Yusoff FCJ have read this judgment in draft and have expressed their agreement with it.

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